In re DELTA RESOURCES, INC., Debtor.

ORIX CREDIT ALLIANCE, INC., Appellee,

v.

DELTA RESOURCES, INC., Appellant.

No. 93-6919

United States Court of Appeals, Eleventh Circuit.

June 14, 1995.

In Chapter 11 proceedings, oversecured creditor moved for relief from automatic stay. The Bankruptcy Court denied the motion and determined that oversecured creditor's interest in its collateral would be adequately protected by periodic cash payments, including accruing postpetition interest. Oversecured creditor appealed. Following further motions, the United States District Court for the Northern District of Alabama, Nos. CV 93-G-1002-W, CV 93-G-1019-W, J. Foy Guin, Jr., J., reversed, and debtor appealed. The Court of Appeals held that: (1) it had jurisdiction over appeals; (2) oversecured creditor's interest in property which must be adequately protected encompasses decline in the value of the collateral only, rather than perpetuating the ratio of the collateral to the debt; and (3) oversecured creditor was not entitled to periodic payments of accruing postpetition interest during pendency of automatic stay.

District court judgment reversed and remanded.

Appeal from the United States District Court for the Northern District of Alabama.

Before EDMONDSON and CARNES, Circuit Judges, and MOYE,* Senior District Judge.

PER CURIAM:

Delta Resources, Inc., ("Delta") appeals the district court's order requiring payment of postpetition interest as part of the adequate protection it was required to pay as debtor-in-possession to appellee, Orix Credit Alliance Inc. ("Orix"). We reverse.

I. FACTS AND PROCEDURAL BACKGROUND

On November 30, 1992, appellant Delta filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 et seq., in the United States Bankruptcy Court for the Northern District of Alabama. On December 29, 1992, appellee Orix, claiming to be an oversecured creditor, moved for relief from the automatic stay, pursuant to 11 U.S.C. § 362, on the ground that, *inter alia*, its perfected security interest in the purchase money equipment was not adequately protected.

At the final hearing before the bankruptcy court the parties agreed that the then-value of the collateral, approximately 13 pieces of heavy equipment, was $643,500. The bankruptcy court concluded that the collateral was slightly depreciating but did not find whether Orix in fact was an oversecured creditor.[1] Instead, the court

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*Honorable Charles A. Moye, Jr., Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

[1]An oversecured creditor is a secured creditor whose collateral is worth more than the amount of the debt to it. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 793 F.2d 1380, 1387 (5th Cir. 1986), *on reh'g*, 808 F.2d 363 (1987) (en banc court reinstates panel opinion), *aff'd*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

merely assumed, as Orix had asserted, that Orix was an oversecured creditor.

The bankruptcy court determined that the equipment at issue was necessary to the effective reorganization of the debtor and thus, under 11 U.S.C. § 362(d)(2), Orix could not receive relief from the automatic stay.[2] However, the bankruptcy court did not determine whether the creditor was entitled to postpetition interest reasoning that that issue should be dealt with at the time of confirmation of the debtor's Chapter 11 plan.

The bankruptcy court also determined that Orix's secured interest in its collateral would be adequately protected by periodic cash payments in accordance with 11 U.S.C. § 361(1).[3] The bankruptcy court granted Orix ad-

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[2]"On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

> (1) for cause, including the lack of adequate protection of *an interest in property* of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if—
>
> > (A) the debtor does not have an equity in such property; *and*
> >
> > (B) such property is not necessary to an effective reorganization."

11 U.S.C. §§ 362(d)(1) and (2) (A) and (B) (emphasis added).

[3]"When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—

> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a *decrease in the value of* such entity's *interest in such property.*"

11 U.S.C. § 361(1) (emphasis added).

equate protection in the amount of $9,972.41 per month to cover accruing depreciation of the equipment, but rejected Orix's contention that as an oversecured creditor it was entitled to receive postpetition interest as part of adequate protection. Accordingly, the bankruptcy court denied Orix's motion for relief from stay.

On April 26, 1993, Orix filed a notice of appeal to the district court from the bankruptcy court's order denying relief from the automatic stay. Orix also filed a motion for leave to appeal.

After Delta failed to pay the first required adequate protection payment, Orix filed a motion to compel payment which the bankruptcy court denied on April 19, 1993. Orix then filed a notice of appeal to the district court from the bankruptcy court's denial of its motion to compel payment. Once again, Orix filed a motion for leave to appeal. Thereafter, Delta filed a motion to stay the briefing schedule and objected to the appeals as premature and thus not properly before the district court.

By order of June 22, 1993, the district court consolidated those appeals. The district court determined that the appeals from the bankruptcy court's orders were as of right. Alternatively, however, the court stated that it would exercise its discretion to hear the appeals and granted the motions for leave to appeal.

On October 19, 1993, the district court entered a "final order" reversing the bankruptcy court. Extending the holding of *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988), the district court determined that an oversecured creditor is entitled to postpetition interest as part of adequate protection. The district court found that Delta should retroactively pay to Orix monthly adequate protection payments consisting of $9,972.41 for the monthly depreciation of its collateral, as well as an additional

amount of $8,292.90 in postpetition interest to maintain its equity cushion. The district court remanded the case to the bankruptcy court directing that Delta pay that amount to Orix retroactive to March 17, 1993, the date of the bankruptcy court's order from the bench denying relief from stay but ordering adequate protection. Delta filed a notice of appeal challenging the district court's reversal of the bankruptcy court's orders. There is no certification under 28 U.S.C. § 1292(b).

Thereafter, the equipment, which was the subject of the motion for relief from stay, was sold and Orix was paid the proceeds of the sale. On January 3, 1994, with the approval of the bankruptcy court, the parties entered into a consent order on remand concerning the district court's order for adequate protection. The equipment at issue having "been sold and the proceeds of the equipment and the interplead adequate protection payments covering depreciation only," Supp.Rec. doc. 19, having been paid to Orix, the issue on appeal was limited to whether the postpetition interest payments ordered by the district court "are due to be paid now because it [Orix] is an unsecured creditor." *Id.* The parties also agreed that Orix would temporarily postpone its collection efforts for the adequate protection payments for postpetition interest and that, at that time, the bankruptcy court need not enforce the mandate of the district court.

On February 18, 1994, the district court granted in part and denied in part Delta's motion to supplement the record. The district court granted Delta's motion to include: 1) the January 3, 1994, consent order on remand entered by Bankruptcy Judge George S. Wright; 2) Orix's November 18, 1993, opposition to motion to stay pending appeal; and 3) Orix's November 2, 1993, motion to enforce appellate order. The district court denied Delta's motion to supplement the record as to: 1) the

December 21, 1993, order and memorandum of decision by Bankruptcy Judge Wright applying the "transformation rule" to the competing interests of AmSouth Bank, N.A. and Orix, and 2) Orix's January 3, 1994, motion to reconsider transformation rule decision because these documents post-dated the district court's order on appeal and had not been before the district court during the course of the appeal.

Nonetheless, this Court may take judicial "notice of another court's order . . . for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation and related filings." *United States v. Jones*, 29 F.3d 1549, 1553-54 (11th Cir. 1994). Here, the bankruptcy court entered an order on December 21, 1993, in the adversary proceeding between creditors AmSouth Bank, N.A. and Orix deciding which creditor had the first priority liens on the heavy equipment at issue, and about which Orix claims to be oversecured. *See AmSouth Bank, N.A. v. Orix Credit Alliance, Inc. (In re Delta Resources)*, 162 B.R. 562 (Bankr. N.D.Ala. 1993).

Although we may not take judicial notice of a finding of fact by the bankruptcy court, *United States v. Jones*, 29 F.3d at 1553, we may note that that the bankruptcy court determined as matter of law that the "transformation rule" is yet the law of the Eleventh Circuit and that under the undisputed facts of this case "AmSouth's security interest in all the debtor's accounts receivables and its equipment is superior to that of ORIX Credit Alliance—including the equipment ORIX originally financed for the debtor, and which was the subject of previous contested matters in this court." *In re Delta Resources*, 162 B.R. at 572. Whether the bankruptcy judge's ruling on the motions for summary judgement in this adversary proceeding may yet reach this Court is uncertain.

II. ANALYSIS

A. Appellate Jurisdiction in Bankruptcy

The first issue presented for decision is whether we may take jurisdiction of this appeal. In the case *sub judice,* the district court accepted Orix's appeal of right as well as in its discretion granting Orix leave to appeal the bankruptcy court's order denying Orix's motion for relief from the automatic stay and awarding Orix only a portion of the adequate protection it sought. At that time, the bankruptcy court had made no finding whether the creditor was entitled to postpetition interest, ostensibly because the issue of postpetition interest might be dealt with in confirmation of the debtor's Chapter 11 plan. And, since the adversary proceeding between AmSouth Bank, N.A. and Orix was pending, it was not then possible to determine precisely what collateral Orix held and, thus, a formal valuation of Orix's secured interest was not possible.

Whether the bankruptcy court's order was a final order, *vel non,* we need say no more than the district court properly exercised jurisdiction. For, even assuming that the bankruptcy court order was not a final order, the district court did not abuse its discretion in exercising interlocutory jurisdiction over the bankruptcy court order.

Had we concluded that the bankruptcy court order at issue was an interlocutory order, the critical question nevertheless would be whether the district court issued a final order which could be appealed to the court of appeals under 28 U.S.C. § 158(d). To begin, in order for a court of appeals to have jurisdiction over a bankruptcy appeal from the district court, the order being appealed from the district court must have been a final order itself, or alternatively, some exception to the finality rule must be applicable. *Martin Bros. Toolmakers, Inc. v. Industrial*

Dev. Bd. (In re Martin Bros. Toolmakers, Inc.), 796 F.2d 1435, 1437 (11th Cir. 1986). *See Growth Realty Cos. v. Regency Woods Apartments (In re Regency Woods Apartments, Ltd.)*, 686 F.2d 899 (11th Cir. 1982). *Cf.* 1 *Collier on Bankruptcy*, ¶ 3.03 at 3-194 (Lawrence P. King ed., 15th ed. 1994) ("[i]f the district court has granted leave to appeal an interlocutory order, its decision cannot be final for section 158(d) purposes, and no appeal to the court of appeals will lie").

Here, the district court's order did not disturb the bankruptcy court's decision not to lift the automatic stay. Instead, relying on *Timbers*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740, the district court held that as a matter of law an oversecured creditor is entitled to postpetition interest as part of adequate protection. The district court then determined the amount of adequate protection which Delta was required to pay as postpetition interest.

In this Circuit, *"district court orders affirming or reversing the bankruptcy judge's* grant or denial of relief from an automatic stay consistently have been held by the courts to be *a final decision* reviewable on appeal." *Barclays-American/Business Credit, Inc. v. Radio WBHP, Inc. (In re Dixie Broadcasting, Inc.)*, 871 F.2d 1023, 1026 (11th Cir.) (citations omitted) (emphasis added), *cert. denied*, 493 U.S. 853, 110 S.Ct. 154, 107 L.Ed.2d 112 (1989). Furthermore, a district court ruling which includes a remand may be a 'final decision' if all that remains to be done is the performance of a ministerial duty. *Gulf Refining Co. v. United States*, 269 U.S. 125, 136, 46 S.Ct. 52, 53, 70 L.Ed. 195 (1925) (rendering judgment for the exact sums set forth in stipulations was a ministerial duty) . . . *Miscott Corp. v. Zaremba Walden Co. (In re Miscott)*, 848 F.2d 1190, 1192 (11th Cir. 1988) (other citations omitted). In this case, the district court reversed the decision of the bankruptcy court and determined that Orix was entitled to adequate protection payments which should include

monthly postpetition interest, in addition to the monthly depreciation previously determined by the bankruptcy court. The district court also determined the amount of postpetition interest, thus, increasing the amount of adequate protection payments Delta must make to Orix.

The district court did not require the bankruptcy court to determine anything, factual or legal, in its remand. The bankruptcy court need not have determined the amount of adequate protection payments or exercise any discretion in complying with the district court's order. And although the district court did not pass title to any property, the district court did direct the delivery of property, here, money. Further, although the district court did not reverse the bankruptcy court's decision to *maintain* the automatic stay, it directed the bankruptcy court to make direct payments of sums certain by Delta to Orix. Such a remand does not require "significant judicial activity," *In re Regency Woods Apartments, Ltd.*, 686 F.2d at 901, which could change the character of this otherwise final order of the district court to an interlocutory order. Thus, we take jurisdiction over this two-level bankruptcy appeal under 28 U.S.C. § 158(d) on a very narrow legal question.[4]

B. Standard of Review

> "As the second court of review of a bankruptcy court's judgment, this court examines independently the bankruptcy court's factual and legal determinations . . . ." *In re Club Assoc.*, 951 F.2d 1223, 1228 (11th Cir. 1992) (footnote and internal quote marks omitted). "Factual find-

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[4]Since there was no § 1292(b) certification we cannot apply the Supreme Court's ruling in *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).

> ings by the bankruptcy court are reviewed under the limited and deferential clearly erroneous standard." *Id.* "In contrast, legal conclusions by the bankruptcy court and the district court are reviewed by this court *de novo*." *Id.*

Allen v. Green (In re Green), 31 F.3d 1098,1099 (11th Cir. 1994).

C. Adequate Protection

The question before us is not whether an oversecured creditor whose collateral is worth more than the amount of its debt in a Chapter 11 bankruptcy case may obtain postpetition interest as part of its claim. Indeed, it seems beyond peradventure that a creditor's right to recover postpetition interest on its oversecured claim pursuant to 11 U.S.C. § 506(b)[5] is virtually "unqualified." *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290, 298 (1989). *Equitable Life Assurance Soc'y v. Sublett (In re Sublett)*, 895 F.2d 1381 (11th Cir. 1990). *Cf. Rake v. Wade*, — U.S. —, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993) (oversecured claimant entitled to preconfirmation and postconfirmation interest on arrearages in Chapter 13 cases). Rather, the narrow legal issue presented for decision is whether Orix, purportedly

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[5] "To the extent that an allowed secured claim is *secured by property the value of which, after any recovery* under subsection (c) of this section, *is greater than the amount of such claim*, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim."

11 U.S.C. §§ 506(b) (emphasis added) and (c).

an oversecured creditor, was entitled to receive periodic cash payments for accruing postpetition interest as part of adequate protection, pursuant to 11 U.S.C. § 362(d)(1), in order to preserve the value of its equity cushion. Appellant Delta does not dispute that an oversecured creditor is entitled to postpetition interest on its claim, although, Delta does dispute whether Orix was, in fact, an oversecured creditor.

Here, the bankruptcy court did not make a factual finding as to Orix's status, but simply *assumed* that Orix was an oversecured creditor for purposes of determining the amount of adequate protection necessary to protect the creditor's interest.[6] The district court, relying upon the Supreme Court's opinion in *Timbers,* reversed the bankruptcy court reasoning that

> [a]s an oversecured creditor, Credit Alliance is entitled to postpetition interest under 11 U.S.C. § 506(b). This section states that "to the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which the claim arose." As this interest accrues, it also becomes secured by the security interest held by the creditor in the property. Thus, the security cushion represented by the value of the property above the creditor's security interest in the property is depleted daily as the interest accrues. As used in the applicable bankruptcy provisions, the value of the credit-

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[6]These similar rulings of the bankruptcy and district courts apparently have had the effect of maintaining the funds involved in a sort of suspended, quasi-escrow manner.

> or's interest means the value of the collateral. *The security or collateral cushion is an inherent part of the value of the collateral. Accordingly, the oversecured creditor has a valid property interest in this security cushion and has a right to adequate protection of this interest. United Savings Association v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

(Emphasis added). And, not surprisingly, on appeal both parties rely on the Supreme Court's opinion in *Timbers* as support for their position.

The Supreme Court has determined that "[t]he phrase 'value of such creditor's interest' in § 506(a) means 'the value of the collateral.' . . . . We think the phrase 'value of such entity's interest' in § 361(1) and (2), when applied to secured creditors, means the same." *Timbers*, 484 U.S. at 372, 108 S.Ct. at 631, 98 L.Ed.2d at 749. The enquiry before us turns on whether the "interest in property" to be protected by 11 U.S.C. § 362(d)(1) entitles an oversecured creditor to receive periodic postpetition interest payments to ensure against the diminution in value of its equity cushion as a part of adequate protection or whether it is designed only to protect against diminution in the value of the collateral, i.e.—depreciation.

Appellee Orix asserts that as interest accrues on its claim the interest by the terms of its contract also becomes secured by its security interest in Delta's assets. Therefore, Orix contends, an oversecured creditor's position erodes by the accrual of postpetition interest and ultimately the adequate protection becomes inadequate. That is, unless the interest is paid, Orix's debt becomes less and less oversecured and eventually becomes undersecured. While Orix is correct that the size of the equity cushion decreases as postpetition interest accrues, the increase in the size of its secured claim resulting from the accrual of that interest is entitled to adequate

protection only to the extent that the value of the collateral at the time of filing exceeded the value of Orix's original secured claim.

To begin, "[u]pon the filing of a bankruptcy petition, § 362 of the Code imposes an automatic stay on actions by creditors to collect their claims from a debtor." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 793 F.2d 1380, 1387 (5th Cir. 1986), *on reh'g*, 808 F.2d 363 (1987) (en banc court reinstates panel opinion), *aff'd*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). Yet a creditor is not without recourse to protect its interests. "Under § 362(d), a creditor may obtain relief from the [automatic] stay (1) 'for cause, including the lack of adequate protection' of the creditor's interest in the collateral." *Timbers*, 793 F.2d at 1387-88.[7]

Ordinarily, creditors are not allowed a claim for interest accruing on their debts during bankruptcy proceedings. *Timbers*, 793 F.2d at 1385. Yet, *as an exception* to that rule, an oversecured creditor, but not an undersecured creditor having the same risk (indeed, it is possible for the undersecured creditor's risks to be much larger quantitatively), is entitled to receive postpetition interest as part of its claim at the time of confirmation of a plan or reorganization, that is, at or near the conclusion of the bankruptcy case. 11 U.S.C. § 506(b). Judge Randall of the Fifth Circuit explained the rationale for this exception.

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[7]The Code provides that "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—(1) for cause, including the lack of adequate protection of an *interest in property* of such party in interest." 11 U.S.C. § 362(d)(1) (emphasis added).

> [T]he interest provisions of the Code and its predecessors, as interpreted by the Supreme Court for almost a century, are premised on the equitable principle that the unencumbered assets of a debtor's estate will not be used to benefit one class of creditors at the expense of another . . . . [Thus,] [a]llowing a claim for postpetition interest by an oversecured creditor, . . . is not inconsistent with that equitable principle, *because only assets encumbered by the creditor's lien will be used to fund the payment of postpetition accrued interest.*

Timbers, 793 F.2d at 1387 (emphasis added).

Nevertheless, the Supreme Court has indicated that an oversecured creditor's allowed secured claim for postpetition interest, which is determined near the conclusion of the bankruptcy case, must be denied to the extent that, together with the principal amount of the claim, it exceeds the value of the collateral. Or put another way, the oversecured creditor's allowed secured claim for postpetition interest is limited to the amount that a creditor was oversecured at the time of filing.

> Even more important for our purposes than § 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims—just as it denies *over*secured creditors postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the collateral. Section 506(b) provides that "*[t]o the extent that* an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim." (Emphasis added.) Since this provision permits postpetition interest to be paid only out of the "security cushion,"

> the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest. See 11 U.S.C. § 502(b)(2). If the Code had meant to give the undersecured creditor, who is thus denied interest on his *claim*, interest on the value of his *collateral*, surely this is where that disposition would have been set forth, and not obscured within the "adequate protection" provision of § 362(d)(1). Instead of the intricate phraseology set forth above, § 506(b) would simply have said that the secured creditor is entitled to interest "on his allowed claim, or on the value of the property securing his allowed claim, whichever is lesser."

Timbers, 484 U.S. at 372-73, 108 S.Ct. at 631, 98 L.Ed.2d at 749.

The Supreme Court has recognized that an undersecured creditor may be entitled to adequate protection to ensure against the decline in the value of its collateral. However, an undersecured creditor is not entitled to receive postpetition "interest on its collateral *during the stay* to assure adequate protection under 11 U.S.C. § 362(d)(1)." *Timbers*, 484 U.S. at 382, 108 S.Ct. at 636, 98 L.Ed.2d at 755 (emphasis added).

Ordinarily, the matter of adequate protection is determined at or near the inception of a bankruptcy case. By contrast, the determination of a creditor's secured status, pursuant to 11 U.S.C. § 506, comes at or near the conclusion of a bankruptcy case.

> Under [11 U.S.C.] § 506(c), the debtor may recover from property securing a creditor's allowed secured *claim* the reasonable and necessary costs and expenses of preserving or disposing of the property, to the extent of any benefit to the creditor. If, after reducing the amount of

> the allowed secured claim by the amount of that recovery, the creditor is oversecured, it is entitled to interest at the contract rate on its net allowed secured claim. § 506(b). *The timing of the payment of accrued interest to an oversecured creditor (at the conclusion of the proceeding) is doubtless based on the fact that it is not possible to compute the amount of the § 506(c) recovery (and, accordingly, the amount of the net allowed secured claim on which interest is computed) until the termination of the proceeding.*

Timbers, 793 F.2d at 1407 (emphasis added).

Similarly, we conclude that 11 U.S.C. § 506(b), providing for postpetition interest on oversecured claims, read *in pari materia* with 11 U.S.C. § 362(d)(1), concerning conditioning the automatic stay on adequate protection, and 11 U.S.C. § 502, regarding the allowance of claims, requires that the payment of accrued postpetition interest to an oversecured creditor await the completion of reorganization or confirmation of the bankruptcy case. The *ratio decidendi* enunciated by the Supreme Court in *Timbers* that an undersecured creditor is not entitled to receive postpetition interest on its collateral *during the stay* to assure adequate protection under 11 U.S.C. § 362(d)(1) applies equally well to an oversecured creditor. Such an interpretation of the Bankruptcy Code is consistent whether the secured creditor is undersecured or oversecured, otherwise "§ 506(b) would simply have said that the *secured* creditor [whether oversecured or undersecured] is entitled to interest 'on his allowed claim, or on the value of the property securing his allowed claim, whichever is lesser.' " *Timbers*, 484 U.S. at 372-73, 108 S.Ct. at 631, 98 L.Ed.2d at 749 (emphasis added). Accordingly, viewing the allowance of postpetition interest to oversecured creditors as a limited ex-

ception only,[8] we hold that an oversecured creditor's interest in property which must be adequately protected encompasses the decline in the value of the collateral only, rather than perpetuating the ratio of the collateral to the debt. The bankruptcy court accomplished that by allowing adequate protection in the amount of accruing depreciation. *See In re Westchase I Assoc.*, 126 B.R. 692 (W.D.N.C. 1991); David G. Epstein et al., *Bankruptcy* § 3-27, at 142-43 (1993).

We think this rule results in the appropriate balance between the conflicting interests of the oversecured creditor on the one hand and the estate, as well as other creditors, secured and unsecured, on the other hand. As one commentator points out:

> [t]here is certainly no reason intrinsic to the phenomenon of credit that entitles oversecured creditors to interest out of their collateral before junior creditors, whether secured [perhaps by the identical collateral] or unsecured, receive any of their principal.

Niall L. O'Toole, *Adequate Protection and Postpetition Interest in Chapter 11 Proceedings*, 56 Am.Bank.L.J. 251, 253 (1982).

Here, even accepting the bankruptcy court's assumption that Orix was an oversecured creditor, although it never made such a factual finding, for the reasons stated above, Orix, as a matter of law, was not entitled to receive periodic payments for accruing postpetition interest as part of adequate protection for any period of time.[9]

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[8] *See*, Niall L. O'Toole, *Adequate Protection and Postpetition Interest in Chapter 11 Proceedings*, 56 Am.Bank.L.J. 251 (1982).

[9] We express no opinion whether Orix may yet be entitled to postpetition interest on its claim, irrespective of the bankruptcy court's subsequent decision that Orix was not an oversecured creditor. *See supra* at 7.

III. CONCLUSION

The district court's order awarding Orix monthly postpetition interest in the amount of $8,292.90 is REVERSED and this case REMANDED to the district court for further proceedings not inconsistent herewith.

FILED
June 14, 1995

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 93-6919

District Court Nos. CV 93-G-1002 & CV93-G-1019
Bankruptcy Court No. 92-72874

IN RE: DELTA RESOURCES, INC.,

Debtor.

ORIX CREDIT ALLIANCE, INC.,

Appellee,

versus

DELTA RESOURCES, INC.,

Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

Before EDMONDSON and CARNES, Circuit Judges, and MOYE,* Senior District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

*Honorable Charles A. Moye, Jr., Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that appellee pay to appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 14, 1995
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: July 18, 1995

FILED
Oct. 19, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: Delta Resources, Inc.,	) Bankruptcy No.
	) BK92-72874
Debtor.	)
ORIX CREDIT ALLIANCE, INC.,	)
	)
Appellant,	)
	)
v.	) CIVIL ACTION NO.
	) 93-G-1002-W
	)
DELTA RESOURCES, INC.,	)
	)
Appellee.	)
	) CONSOLIDATED
	) WITH
	)
ORIX CREDIT ALLIANCE, INC.,	)
	)
Appellant,	)
	)
v.	) CIVIL ACTION NO.
	) 93-G-1019-W
	)
DELTA RESOURCES, INC.,	)
	)
Appellee.	) Entered Oct. 19, 1993

MEMORANDUM OPINION

This cause is before the court on appeal by Orix Credit Alliance, Inc. (Credit Alliance) from a decision by the United States Bankruptcy Court for the Northern District of Alabama. The sole issue for this court's decision is whether the bankruptcy court erred in its ruling that Delta Resources (Delta), the debtor, has provided adequate protection to its creditor Orix. Such conclusions of law reached by the bankruptcy court are reviewed *de novo* by this court. *Olympia & York Florida Equity v. Bank of New York,* 913 F.2d 873, 879 (11th Cir. 1990). A finding of adequate protection will not be set aside unless that finding was clearly erroneous. *Chrysler Credit Corp. v. Ruggiere (In re George Ruggiere Chrysler-Plymouth, Inc.),* 727 F.2d 1017, 1019 (11th Cir. 1984). Having reviewed the record, the applicable law, and the submissions of counsel, the court finds that the decision of the bankruptcy court is due to be reversed as clearly erroneous.

The facts of this case are essentially undisputed and were stipulated to in conjunction with the bankruptcy proceedings. Delta filed a petition for bankruptcy under 11 U.S.C. §101, *et seq.* Credit Alliance holds a perfected security interest in Delta's accounts receivable, equipment, general intangibles, and other property. Credit Alliance's primary collateral consists of eleven pieces of heavy equipment (equipment). Credit Alliance filed a motion for relief from stay contending among other things that its security interest in the equipment was not adequately protected. Delta opposed the motion contending that Credit Alliance's interest was adequately protected and that the equipment was necessary to Delta's reorganization. An evidentiary hearing was held at which AmSouth, a competing creditor, appeared. As of the petition date, Delta owed Credit Alliance $826,339.36. The parties stipulated that the value of the

equipment was $643,500.00. Credit Alliance's other collateral consists of a first lien on Delta's tax refund of approximately $140,000.00 and a second lien on Delta's accounts receivable which second lien has a value in excess of $100,000.00. Thus, the total value of Credit Alliance's collateral is at least $883,500.00. The creditor admitted at the hearing that the value of the collateral exceeded the debt. Thus, it is classified as an oversecured creditor. Bankruptcy opinion of April 14, 1993, paragraph 4. In the course of the bankruptcy proceedings, Delta agreed that the equipment is depreciating at a rate of approximately $9,000.00 per month. The bankruptcy court found that the sum of $9,972.41 would serve as adequate protection of Credit Alliance's security interest. Bankruptcy opinion of April 14, 1993, paragraph 12. Although Credit Alliance contends that the monthly depreciation is greater than this amount, it has accepted this figure as representing the amount of monthly depreciation for purposes of this appeal. The bankruptcy court expressly reserved the issue of whether Credit Alliance was entitled to post-petition interest. Bankruptcy opinion of April 14, 1993, paragraph 12.

Delta failed to make its first payment at the time due. At about the same time, AmSouth filed a complaint alleging that it had a superior interest in the equipment. AmSouth alleged that Credit Alliance was not entitled to the proceeds of any sale of the equipment nor to the adequate protection payments ordered by the bankruptcy court. AmSouth further contended that it was due to be paid the adequate protection payments ordered by the bankruptcy court. Delta filed a complaint in intervention proposing to pay the funds into the court rather than to Credit Alliance. The bankruptcy court ordered that the funds be paid into escrow pending further orders and denied Credit Alliance's motion to compel. An appeal from the order denying relief from stay and an

appeal from the order denying the motion to compel were filed. Dispute as to whether these orders were appealable was resolved by this court's finding that the appeals were properly before it.

As an oversecured creditor, Credit Alliance is entitled to post-petition interest under 11 U.S.C. §506(b). This section states that "to the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which the claim arose." As this interest accrues, it also becomes secured by the security interest held by the creditor in the property. Thus, the security cushion represented by value of the property above the creditor's security interest in the property is depleted daily as the interest accrues. As used in the applicable bankruptcy provisions, the value of the creditor's interest means the value of the collateral. The security or collateral cushion is an inherent part of the value of the collateral. Accordingly, the oversecured creditor has a valid property interest in this security cushion and has a right to adequate protection of this interest. *United Savings Association v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988).

In the case at bar, the equity cushion is small, only $57,160.64 or 6.47% of the total value of the collateral exclusive of post-petition interest. Undisputedly, the value of the collateral is not appreciating. The payments ordered by the bankruptcy court would offset future depreciation in the value of the collateral but would not protect Credit Alliance from the damage to the security cushion engendered by the accruing interest. The debtor had the burden of proving that the creditor's collateral

cushion was being maintained at or near its prebankruptcy level. 11 U.S.C. §362(g). It failed to do so.

The risk to its security cushion faced by Credit Alliance is further increased by the claims of AmSouth. AmSouth has a first lien and security interest in the debtor's accounts receivable. AmSouth is an oversecured creditor as to these accounts and as such is entitled to post-petition interest under 11 U.S.C. §506(b). Credit Alliance is therefore a junior lienholder as to these accounts receivable. As such, it is entitled to adequate protection payments to protect it from the eroding effect the interest payments to AmSouth will cause to Credit Alliance's security cushion. *Ridgemont Apartment Associates, Ltd. v. Atlanta English Village, Ltd.*, 110 Bankr. 77 (N.D. Ga)., *aff'd* 890 F.2d 1166 (11th Cir. 1989). This right to adequate protection, even as a junior lienholder, would also exist as to Credit Alliance's interest in the equipment should AmSouth be shown to have senior interest in it as well. The court finds that Delta failed to carry its burden of proof regarding adequate protection of Credit Alliance's interest in the property. 11 U.S.C. §362(g).

Accordingly, the court holds that the decision of the bankruptcy court is due to be reversed. The court further finds that the case is due to be remanded to the United States Bankruptcy Court for the Northern District of Alabama, Western Division, with instructions that it order monthly adequate protection payments of $18,264.31 (bankruptcy court determined monthly depreciation of $9,972.41 plus $8,292.90 monthly postpetition interest) be paid by Delta Resources, Inc. directly to Credit Alliance retroactive to March 17, 1993, the date of the bankruptcy court's order from the bench denying relief from stay. An order in conformity with this opinion shall be entered contemporaneously herewith.

DONE this 19th day of October 1993.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

FILED
Oct. 19, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: Delta Resources, Inc.,	) Bankruptcy No.
	) BK92-72874
Debtor.	)
	)
ORIX CREDIT ALLIANCE, INC.,	)
	)
	)
Appellant,	)
	)
v.	) CIVIL ACTION NO.
	) 93-G-1002-W
	)
DELTA RESOURCES, INC.,	)
	)
Appellee.	)
	) CONSOLIDATED
	) WITH
	)
ORIX CREDIT ALLIANCE, INC.,	)
	)
	)
Appellant,	)
	)
v.	) CIVIL ACTION NO.
	) 93-G-1019-W
	)
DELTA RESOURCES, INC.,	)
	)
Appellee.	) Entered Oct. 19, 1993

FINAL ORDER

This cause is before the court on appeal by Orix Credit Alliance from a decision by the United States Bankruptcy Court for the Northern District of Alabama, Western Division. Having reviewed the record, the submission of counsel, and the applicable law, the court finds that the decision of the bankruptcy court is due to be reversed and the case remanded to that court with instructions. In accordance with the memorandum opinion entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the decision of the bankruptcy court is hereby REVERSED and the case REMANDED to the United States Bankruptcy Court for the Northern District of Alabama, Western Division, with instructions that it order monthly adequate protection payments of $18,264.31 (bankruptcy court determined monthly depreciation of $9,972.41 plus $8,292.90 monthly post-petition interest) be paid by Delta Resources, Inc. directly to Credit Alliance retroactive to March 17, 1993, the date of the bankruptcy court's order from the bench denying relief from stay.

DONE and ORDERED this 19th day of October 1993.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

FILED
April 14, 1993

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

IN RE: BK92-72874

DELTA RESOURCES, INC.,

CHAPTER 11

DEBTOR

ORDER DENYING RELIEF FROM STAY AND
GRANTING ADEQUATE PROTECTION PAYMENTS

This matter came before the court on a motion for relief from stay filed by ORIX Credit Alliance to enforce its security interest against equipment used by the debtor, Delta Resources, Inc. After two lengthy hearings, testimony of witnesses and numerous pleadings, the court has deduced that indeed this dispute is simply matter of providing adequate protection for this oversecured creditor's interest until the debtor's Chapter 11 plan can provide a more permanent remedy. Therefore, the court hereby

ORDERED, DECREED AND ADJUDGED:

1. That in Credit Alliance's motion for relief from stay (Doc. 48) it sought the court's permission to enforce its security interest against thirteen pieces of John Deere heavy equipment used in Delta Resources, Inc.'s business;

2. That the creditor alleged its interest was not adequately protected and further, that the debtor lacked equity in the collateral and that the collateral was not necessary to its financial reorganization;

3. And Credit Alliance's motion also said that the notes in the case claim

> a security interest in the property and in any and all inventory, goods, equipment, machinery, general intangibles, contract rights, furniture, fixtures and assets of any and every kind, wherever located, not or hereafter belonging to [Debtor] or in which [Debtor] has any interest[.]

(Doc. 29).

4. Consequently, Credit Alliance admitted in its opening statement that it was oversecured.

5. 11 U.S.C. § 362(d) provides two grounds upon which a secured creditor like Credit Alliance may receive relief from the automatic stay. Section 362(d)(1) provides that a creditor may receive relief "for cause, including the lack of adequate protection" while Section 362(d)(2) provides relief from stay for the creditor who can show "(A) the debtor does not have an equity in such property; *and* (B) such property is not necessary to an effective reorganization." (emphasis added)

6. The court determines that the equipment which is at issue in this dispute is necessary for the reorganization of the debtor. Therefore Credit Alliance may not receive relief from stay under Section 362(d)(2). The portion of the creditor's motion seeking relief from stay under this code subsection is DENIED.

7. However, the creditor is due adequate protection of the value of its security interest in the equipment. The parties agreed at hearing, based on the testimony of Jim Skelton, that the collateral is worth approximately $643,500. Skelton estimated the useful life of the equipment at five years. However, this estimate was based on information that the equipment would soon be used

more aggressively. information that was not verified by the debtor.

8. Additionally, other witnesses Bobby Suggs and David Patterson, testified that Delta Resources maintained its equipment extremely well, better than industry average. Consequently, the court determines that the useful life of the John Deere equipment at issue here is eight years.

9. The first credit purchases of equipment was September 30, 1991 with the total purchase valued at approximately $1 million, and that total had depreciated to $643,500.00 15 months later.

10. At the end of eight years (subtracting 15 months) the testimony of David Patterson indicated that the equipment would be worth 30 percent of the purchase price.

11. Therefore, the court is going to determine that Delta Resources' proposal to pay Credit Alliance $9,972.41 per month would be in keeping with straight-line depreciation on equipment of this value which is exceptionally well-maintained.

12. Such a $9,972.41-a-month payment will serve as adequate protection of this creditor's security interest. Inasmuch as the collateral in the instant case is slightly declining in value (as distinguished from *United Savings Association v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988) which was slightly appreciating in value), then such creditor is entitled to adequate protection by means of periodic payments under § 361(1) to "the extent that the stay under section 362 of this title . . . results in a decrease in the value of such entity's interest in such property" — here ORIX Credit Alliance is due to be paid $9,972.41 a month periodic payments as adequate protection. The court will make no finding at this time as to whether the creditor is entitled to post-petition interest, an issue which may be dealt with in confirmation of the

debtor's Chapter 11 plan. *Cf. United Savings Association v. Timber of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988).

13. Therefore, Credit Alliance's motion for relief from stay under 11 U.S.C. § 362(d)(1) must also be DENIED since its secured interest in its collateral will be adequately protected by periodic cash payments, a means for adequate protection listed in 11 U.S.C. § 361(1).

14. This order was originally made from the bench March 17, and the court directed Delta Resources to begin the $9,972.41-per-month payments April 1, 1993.

DONE AND ORDERED this 14th day of April, 1993.

/s/ George S. Wright
GEORGE S. WRIGHT
BANKRUPTCY JUDGE

cc: Debtor - Delta Resources, Inc.
Attorney - Jerry W. Schoel, Esq.
Trustee - Helen H. Ellis, Estate Analyst
Parties In Interest -
ORIX Credit Alliance,
Attorneys, Michael L. Hall and William S. Hereford

FILED
April 23, 1993

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

IN RE:
DELTA RESOURCES, INC.

CHAPTER 11
Debtor. CASE NO. 92-72874

ORDER

The above-styled MOTION TO COMPEL PAYMENT FILED BY ORIX CREDIT ALLIANCE, INC. having been set down for a hearing before this Court on April 13, 1993, upon Notice of Hearing to the parties in interest,

IT IS HEREBY ORDERED that the MOTION TO COMPEL PAYMENT FILED BY ORIX CREDIT ALLIANCE, INC. be, and the same is, hereby DENIED.

DONE AND ORDERED this 19th day of April, 1993.

/s/ George S. Wright
GEORGE S. WRIGHT
BANKRUPTCY JUDGE

rs

cc: Debtor(s) - DELTA RESOURCES, INC.
Attorney - JERRY W. SCHOEL
Trustee - DIP
Estate Analyst - HELEN ELLIS
Parties In Interest - ORIX Credit Alliance, Inc.
C/O MICHAEL L. HALL AND
WILLIAM S. HEREFORD, ATTORNEYS
AMSOUTH BANK, N.A.
C/O DAVID B. ANDERSON

STATISTICAL ANALYSIS OF CHAPTER 11

BY: ED FLYNN
MANAGEMENT ANALYST
BANKRUPTCY DIVISION

October 1989

IV. CONFIRMATION RATES

Prior to the Ernst & Young study, the only information available on confirmation rates was obtained from those cases which have been closed. As noted above, only about one out of fifteen closed chapter 11 cases had been confirmed. The results of the Ernst & Young study indicate that the overall confirmation rate for chapter 11 cases filed prior to 1987 was about 17%, and that this rate had been rising steadily. I estimate that 25-30% of the chapter 11 cases filed in or after 1987 will be confirmed.

A. CONFIRMATION RATES FOR CASES FILED PRIOR TO 1987:

To date, only about 4.3 percent of all chapter 11 cases filed prior to 1987 have been closed after confirmation. Ernst & Young found that an additional 10.5% of these cases have been confirmed, but not closed. It is further estimated that an additional two to three percent of pre-1987 cases will eventually get confirmed. Adding these three figures together gives a confirmation rate of about 17% for the 125,638 chapter 11 cases filed between 1979 and 1986.

Of course, confirmation is not the only indicator of success for a chapter 11 cases. As can be seen in table 5, above, a substantial proportion of chapter 11 cases result in payments to creditors after being converted to chapter 7 or chapter 13. Also, secured creditors often receive sat-

isfaction through filing a motion for relief from the automatic stay, or a motion to compel the abandonment of estate property. During 1988, there were about 195,000 relief from stay motions filed nationwide. Although no statistics are kept on the disposition of these motions, certainly many result in transfer of property from chapter 11 debtors to secured creditors. When relief from the automatic stay is granted in a single asset chapter 11 case (e.g. many real estate cases), there may be no need for confirmation, or even for the filing of a plan of reorganization. No separate statistics are maintained on motions to compel abandonments.

The data from the study also disclosed that the national chapter 11 confirmation rate appears to be rising, as is the total number of confirmations per year. While it is estimated that only 13.3% of the cases filed in 1982 have been or will be confirmed, it appears that approximately 22.4% of the cases filed in 1986 have been or will be confirmed. The following table shows national confirmation rates between 1980 and 1986.

(Table 7.)

ESTIMATES OF CHAPTER 11 CASES CONFIRMED 1979-1986

Filing Year	Total Cases Filed	Projected Number of Pending Confirmed	Number of Closed Confirmed	Projected Future Conf's	Estimate of Total Conf's	Overall Conf. Rate
1979 /80	7,944	683	661	14	1,358	17.1%
1981	10,085	818	605	33	1,456	14.4%
1982	18,915	1,430	991	89	2,510	13.3%
1983	20,351	1,865	904	157	2,926	14.4%
1984	20,311	2,289	681	357	3,327	16.4%
1985	23,408	2,694	889	697	4,280	18.3%
1986	24,624	3,430	295	1,780	5,505	22.4%
Total	125,638	13,209	5,026	3,127	21,362	17.0%

The above table seems to indicate that the chapter 11 process is becoming more effective. It appears that a greater number of the cases filed during 1986 will result in confirmation than the combined number of confirmations for cases filed in 1980, 1981, and 1982.

B. PRESENT AND FUTURE CONFIRMATION RATES:

The Ernst & Young study did not include a review of any cases filed after December 31, 1986. It was thought that too few of these more recently filed chapter 11 cases would have been confirmed when the study was being done (in early 1989). Thus, we can only speculate on the confirmation rate for cases filed since 1987.

Three indicators can be used in making this estimate — past confirmation rates, past total confirmations, and case filing levels. Table 7 indicates that confirmation rates rose steadily between 1982 and 1986. I know of no reason why this trend would not have continued for cases filed after 1986. The Ernst & Young study further revealed that total chapter 11 confirmations increased each year between 1980 and 1986. As noted in Table 1, Chapter 11 filings decreased by about 30% between 1986 and 1988. About one-half of this decrease appears to be attributable to the availability of chapter 12 for family farmers. These farm cases may have had an extremely low confirmation rate when they were filed under chapter 11. (Farm cases tend to have relatively low asset and debt amounts compared to other chapter 11 cases. As noted in Section X, there is considerable evidence that cases where the debtor has a relatively low amount of assets are much less likely to result in confirmation than cases involving substantial assets.)

Based on these three factors, I estimate that the confirmation rate for the chapter 11 cases filed during 1987, 1988, and 1989 will be between 25 and 30 percent. This is

based on the assumptions that total confirmations would not have decreased to the extent that case filings have, and that the recent decrease in chapter 11 case filings was primarily among those cases which were less likely than average to ever get confirmed.

C. CONFIRMATION RATES BY DISTRICT:

Although the national confirmation rate was about 17% for cases filed prior to 1987, the confirmation rate varied substantially from district to district. In the Southern District of New York it is estimated that more than 40% of chapter 11 cases result in confirmation, while in five of the other study districts it is estimated that the confirmation rate for pre-1987 cases is less than 10 percent. Following is the estimate of the overall confirmation rate in the 15 study districts.

(Table 8.)

CONFIRMATION RATES BY DISTRICT

DISTRICT	ESTIMATED CONFIRMATION RATE	MEDIAN TIME FILING TO CONFIRMATION
1.	8.9%	685 DAYS
2.	8.1%	693 "
3.	11.8%	568 "
4.	19.6%	722 "
5.	19.4%	581 "
6.	13.7%	726 "
7.	9.6%	566 "
8.	7.1%	505 "
9.	21.3%	502 "
10.	31.0%	941 "
11.	27.3%	708 "
12.	43.0%	596 "
13.	14.5%	906 "
14.	23.2%	461 "
15.	7.3%	743 "

D. LIQUIDATING PLANS:

The Ernst & Young employees were not instructed to note if a plan was a true plan of reorganization or if it was a liquidating plan. Nevertheless, they did review a number of cases in which the plan contemplated liquidation of the business. The two Ernst & Young employees who visited the most districts and reviewed the most cases estimated that approximately 20 to 30 percent of the cases they reviewed were liquidations rather than reorganizations.

In light of the facts that 17% of chapter 11 cases get confirmed, about one-quarter of these involve liquidating plans, and that some of the reorganizations are not successful, it can be estimated that only about 10 to 12 percent of chapter 11 cases result in an actual reorganization of the filing entity. Further, some of these reorganizations may not be considered fully successful even if the business is reorganized and the creditors are paid. Some reorganized businesses will falter a second time. This may lead to a second chapter 11, a liquidation, or the sale of the business.

V. CONSOLIDATIONS

Frequently, two or more related chapter 11 cases are consolidated for purposes of administration. More often than not, activity in these related cases is entered on a single docket sheet, and they result in a single plan of reorganization. In other instances the related cases may have separate docket sheets and plans, but the related estates can be viewed as a single estate to be administered by the bankruptcy court.

In the Ernst & Young study, the bankruptcy clerks were sent lists of pending cases and asked to determine if they had been confirmed. Where a case had been consolidated with one or more other cases, the accountants re-

viewed the entire consolidated estate, regardless of whether the case on the clerk's listing had been the lead case in the consolidated estate. This methodology resulted in a slight over-representation of consolidated cases in the Ernst & Young study.